Filed 12/31/1 Lindgren v. Placer County Civil Service Commission CA3

NOT TO BE PUBLISHED



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Placer)**

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| JOHN LINDGREN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>PLACER COUNTY CIVIL SERVICE COMMISSION,<br><br>Defendant;<br><br>PLACER COUNTY DEPARTMENT OF PUBLIC WORKS,<br><br>Real Party in Interest and Respondent. | C081744<br><br>(Super. Ct. No. S-CV-0032404) |

Real Party in Interest Placer County Department of Public Works (DPW) demoted plaintiff John Lindgren after he made threats of violence against a coworker. Defendant Placer County Civil Service Commission (the Board) sustained the demotion.

Lindgren sought a writ of administrative mandate in the superior court directing the Board to overturn its decision. Upon its belated inclusion in the writ proceeding *after* the statute of limitations had expired for challenging the Board's ruling, DPW twice demurred on the ground that it had been an indispensable party that could not be joined any longer, and renewed this issue in its opposition to the writ. The trial court did not rule on this threshold issue in denying the writ of mandate on substantive grounds.

Lindgren appealed in March 2016;[1] his briefing was completed in October 2016, and the panel as presently constituted was assigned the matter in September 2018. His focus on appeal is on the substance of the administrative ruling, initially ignoring in his opening brief his failure to name the DPW as a party in the original petition before the running of the limitations period. The DPW renews the issue in its opposition;[2] Lindgren at last addresses it in his reply brief.

We agree that this procedural default is a proper alternative theory on which to sustain the judgment. We will affirm the judgment on this basis.

## FACTUAL AND PROCEDURAL BACKGROUND

In light of the dispositive issue on appeal, our focus is on procedural matters. We include a brief synopsis of the facts in the Board's 2013 opinion for context.

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**1** We deem Lindgren's premature notice of appeal to be from the subsequently filed judgment of dismissal. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 959.)

**2** Lindgren contends DPW cannot raise this issue on appeal absent a cross-appeal. This claim is contrary to black letter principles of appellate law. (Code Civ. Proc., § 906 [further undesignated statutory references are to this code]; *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 39, fn. 19 [respondent may raise *any* issue to support judgment].) Indeed, we may affirm a judgment on *any* basis, even where it was never previously invoked. (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 98.)

In October *2012*, Lindgren was involved in a minor car accident involving two county-owned vehicles, denting the license plate of the other vehicle. When another coworker made a joke about the incident, Lindgren became irate. When the coworker told him not to threaten him, Lindgren responded, " 'I wasn't threatening you, but now I am' " and demanded that the coworker step outside with him. Other witnesses described Lindgren as shouting and screaming, and aggressively demanding that the third party step outside with him. After the coworker defused the confrontation, he reported it to his supervisor. The Board sustained the DPW's demotion of Lindgren one step from his "senior" position, but rescinded a 40-hour suspension without pay as overly severe. The Board served its decision on Lindgren by mail on April 12, 2013. The decision explicitly recited that "Judicial review of the decision . . . shall be filed not later than the 90th day following the date on which the decision becomes final. (Code Civ. Proc., § 1094.6, subd. (b).) A written decision . . . [is] considered 'final' . . . upon the date the decision . . . [is] mailed to you . . . ." The parties do not direct us to any provision for reconsideration of the Board's decisions, and the Placer County Code describes administrative remedies as being exhausted upon the issuance of the findings of the hearing body. (Placer County Code, § 3.08.1310.)

Lindgren filed his original petition for writ of mandate 88 days later on July 9, 2013. It named only the Board as defendant. Lindgren then filed an amended petition on August 27, 2013, in which he first named the DPW as a party. According to later allegations that the DPW admitted, counsel for the Board had advised Lindgren to add the DPW.

The DPW demurred to this pleading. The trial court found that the allegations "as currently pled, appear to be barred by the statute of limitations. (§1094.6[, subd.] (b).) Moreover, the amended petition is not verified." The trial court granted Lindgren leave to amend.

Lindgren filed a second amended petition in December 2013. This petition acknowledged that the Board's decision "was served on April 12, 2013." It also made the tenebrous allegations that "The Notice [a reference without antecedent] only referenced the decision of the [Board] and [did not make any] mention of the [DPW] or its decision. Therefore, Petitioner has to date [not] received [any] notice from the [DPW] of any deadline or applicable statute of limitations to file for judicial review of [its] disciplinary action . . . , as required by . . . [section] 1094.6[, subdivision] (f)." The petition also included the legal conclusion in the form of an allegation that "the [DPW] and the [Board] are not distinct corporate entities separate from Placer County and, therefore, service against one department of the County effects service against all such departments."

The DPW renewed its assertion that it was an indispensable party against whom the limitations period had run in a demurrer to the new petition. Despite the evident flaws in the allegations with respect to this issue (given that nothing in section 1094.6, subdivision (f) would require the *DPW*—as opposed to the Board rendering the decision—to give notice of the statute of limitations, and the other allegation was a mere legal conclusion), the trial court ruled these were sufficient to withstand a demurrer.

The Board filed an answer disclaiming any interest in the matter or intention to participate in it. The DPW's answer reasserted its status as an unavailable indispensable party. It also renewed this argument in its opposition to the petition. The trial court, as noted, denied the petition on substantive grounds without ruling on the issue of an unavailable indispensable party.

## DISCUSSION

In a proceeding challenging an administrative decision, the real party in interest is an indispensable party. A failure to name a real party in interest before the expiration of the 90-day limitations period precludes the later inclusion of the real party in interest in

the proceeding[3] and is therefore grounds for dismissing the proceeding for the absence of an indispensable party.[4] (*Simonelli v. City of Carmel-by-the-Sea* (2015) 240 Cal.App.4th 480, 484-485 [naming only the city granting a permit and not the developer obtaining the permit within the limitations period subjects the proceeding to dismissal because real party is indispensable]; *id*. at pp. 486-487 [finding, however, that limitations period had not run against developer].) A leading treatise on civil procedure points out that a real party in interest is any entity that will be directly affected by the outcome of the writ proceeding, which *must* be named in the petition or else it is subject to dismissal. (1 Cal. Civil Writ Practice (Cont.Ed.Bar 4th ed. 2018) §§ 5.34, 5.35, pp. 5-16.1, 5-17 to 5-18.) Thus, in *Inland Counties Regional Center, Inc. v. Office of Administrative Hearings* (1987) 193 Cal.App.3d 700, 702-704, the trial court properly set aside a judgment issuing a writ of mandate against an administrative agency's decision because the petition did not name the real party in interest before the expiration of the limitations period. A treatise authored by a member of this court also makes this point in the context of environmental litigation. (2 Robie et al., Cal. Civil Practice: Environmental Litigation (2018) § 8.26, p. 49 [citing *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 690, 693, 699 (the failure to name developer as party in timely fashion along with city and lead agency is fatal to proceeding)].)

Lindgren does not appear to dispute this point. As we noted in *Cal Fire Local 2881 v. Public Employment Relations Bd.* (2018) 20 Cal.App.5th 813, 819, a quasi-judicial administrative agency charged with resolving employment disputes does not have

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[3] The filing of the original petition stops the running of the limitations period only as to the parties named at the time the petition was filed. (*Thompson v. Palmer Corp.* (1956) 138 Cal.App.2d 387, 396.)

[4] The trial court's discretion to dismiss a proceeding on this basis is guided by criteria in section 389. As Lindgren does not dispute that these criteria would require dismissal if in fact the DPW was an unavailable indispensable party, we do not need to discuss them.

any authority directly to change the working conditions of employees; only the appointing agency can do so. Therefore, the DPW is indispensable to a ruling directing it to do so. Rather, Lindgren insists (in echo of the legal conclusion in his petition) that the flaw in the DPW's claim of being an indispensable party that is unavailable because of the expiration of the limitations period is DPW's incorrect assumption that the DPW "is an independent entity from [the Board]," because both are subentities of Placer County. The law is not in accord with Lindgren's metaphysics.

In response to a similar argument, *Elk County Water Dist. v. Department of Forestry & Fire Protection* (1997) 53 Cal.App.4th 1 had concluded that the failure to join the state entity responsible for promulgating timber rules in an action challenging the department's application of those rules precluded any adjudication of the validity of the underlying rules. (*Id*. at p. 8.) In response to the plaintiff's assertion that the rule-making entity "exists 'in the department' " and therefore "need not be separately served," the court responded that there was an absence of any cited authority "holding one agency bound by a ruling affecting another simply because of an organizational relationship found only in code structure." (*Id*. at p. 9.)

We explained in *Sacramento County Alliance of Law Enforcement v. County of Sacramento* (2007) 151 Cal.App.4th 1012 that naming only the county as defendant did not entitle the plaintiffs to a writ of mandate directing the civil service commission of the county to hear their appeals, because the law has long recognized the distinction between a county as an entity and the autonomy of various subentities in its structure; the writ could be directed against only the ministerial officers responsible for the administrative action at issue and not the entity itself. (*Id*. at p. 1020.) We concluded the civil service commission was such an autonomous entity, distinct from the county *qua* county. (*Ibid*.)

Lindgren is incorrect that our ruling rested on the status of the Sacramento County commission as an entity created under the county charter rather than in county ordinance.

We were simply quoting from *Department of Health Services v. Kennedy* (1984) 163 Cal.App.3d 799, which confronted a claim that an appointing entity could not seek a writ of mandate to review the decision of a civil service commission (apparently regarding penalties imposed on the entities' employees (*id*. at p. 801)) because both the commission and the appointing entity were arms of county government (*id*. at p. 802). *Kennedy* indeed remarked on the commission's status as an agency in the county charter before stating, "Therefore, it has the *same autonomous stature*, distinct from the county's corporate identity, recognized in *County of* [*Los Angeles*] *v. Tax Appeals Bd. No. 2* [(1968)] 267 Cal.App.2d 830" (italics added), and as a result "there is no barrier to the Department initiating a mandamus proceeding, as an executive arm of the corporate county, against the Commission." (*Department of Health Services v. Kennedy, supra*, 163 Cal.App.3d at p. 802.)

However, once again the charter status of the agency is not part of the *Kennedy* ratio decidendi, because the agency to which *Kennedy* was comparing the commission in *Tax Appeals Bd. No. 2* was a tax board created by *ordinance*. (*County of Los Angeles v. Tax Appeals Bd. No. 2*, *supra*, 267 Cal.App.2d at p. 832.) In response to a claim that this tax board "is an agency of the county itself and therefore [its] various orders may not be challenged by the county for the reason that in making such a challenge the county is seeking to review its own decisions" (*id*. at p. 833), the court concluded, "No legal precedents are cited to support [this argument] and [it appeals] to neither logic nor reason" (*id*. at pp. 833-834). *Tax Appeals Bd. No. 2* concluded that "following the establishment of Tax Appeals Boards, sitting as quasi-judicial bodies over disputes between taxpayers and officers of the county, the county may petition for judicial review of their decisions." (*Id*. at p. 834.) Similarly, *Elk County's* holding does not rest on any constitutional stature of the rule-making entity; both it and the department were simply creatures of statute.

Divested of this theory of a unity of interest, Lindgren does not have any basis for avoiding the fatal effect of failing to name the real party in interest, the DPW, in the original petition filed (barely) within the limitations period. We therefore affirm the judgment denying a petition for administrative mandate on this basis in its entirety.[5]

**DISPOSITION**

The judgment is affirmed. The DPW shall recover its costs of appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.

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[5] Lindgren tags on an argument at the end of his discussion of this issue in which he asserts that since there was jurisdiction over the Board in the trial court, it should be considered to have "defaulted" on appeal by not appearing and we should sanction it. The Board *prevailed* in the trial court, in the sense that a writ did not issue against its decision. Unlike an appellant, who bears the duty to demonstrate affirmatively any error in a trial court's ruling, a respondent does not have any obligation to appear on appeal and may leave it to an appellant to establish any reversible error on the facts. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409; *Miles v. Speidel* (1989) 211 Cal.App.3d 879, 881.) Given that the DPW was an unavailable indispensable party, the Board did not need to appear to make that point. We therefore reject this contention.